16-432

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 94.

THE E. E. BOLLES WOODEN WARE COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED OCTOBER 17, 1879.

A glance over the record, and a consideration of its peculiar features, would do much to persuade the court that this decree was not merely a device, but one ingeniously contrived in the interest of a prolonged litigation to enable the complainant company to get possession of the rents and profits of the property, and at the same time prevent Grant from submitting his equities to the judgment of this impartial tribunal with the benefits of a supersedeas, though ever so ready and able to indemnify the insurance company from all loss.

The device was a failure as it certainly ought to be.

Very respectfully submitted,

WILLIAM A. MELOY,

of Counsel for Appellant.

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1 Circuit court of the United States for the eastern district of Wisconsin.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

At a stated term of the circuit court of the United States for the eastern district of Wisconsin, begun and held according to law, at the city of Milwaukee, on the first Monday (being the sixth day) of January, A. D. 1879. Present, the honorable Thomas Drummond, circuit judge, presiding; and the honorable Charles E. Dyer, district judge; Henry Fink, marshal; Edward Kurtz, clerk.

Among other, the following proceedings were had, to wit:

THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* THE E. E. BOLLES WOODEN WARE COMPANY, DEFENDANT. } At law.

Be it remembered that heretofore, to wit, on the nineteenth day of July, A. D. 1878, came Mr. G. W. Hazelton, U. S. district attorney, and filed his præcipe for a summons in an action for relief; which præcipe is as follows:

Præcipe for summons.

Circuit court of the United States of America for the eastern district of Wisconsin.

THE U. S. OF AMERICA *vs.* THE E. E. BOLLES WOODEN WARE COMPANY. } For relief.

2 Issue a summons in the above-entitled cause, returnable according to law. Complaint not served.

G. W. HAZELTON,
U. S. Dist. Attorney.

To EDWARD KURTZ, *Clerk.*

Whereupon a summons issued, returnable according to law, as follows:

Summons.

Circuit court of the United States for the eastern district of Wisconsin.

THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* THE E. E. BOLLES WOODEN WARE COMPANY, DEFENDANT. } Complaint not served.

Summons for relief.

The President of the United States to the above-named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in this action, which will be filed in the office of the clerk

of this court, at Milwaukee, in said district. And you are also required to file your answer thereto in said clerk's office, at Milwaukee, and to serve a copy thereof on the attorney of the plaintiff, whose name is subscribed hereto, at his office, in Milwaukee, Wis., within twenty days after the service of this summons on you, exclusive of the day of such service, and if you fail to answer the complaint as aforesaid the plaintiff will apply to the court for the relief demanded in the complaint. The marshal of said district is hereby commanded to serve this summons, and make due return thereto.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the said eastern district of Wisconsin, this 19th day of July, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States the 103rd.

[SEAL.] EDWARD KURTZ, *Clerk.*

G. W. HAZELTON, *U. S. Attorney.*

Return.

Summons returned. "Served on the within-named E. E. Bolles Wooden Ware Company by showing to C. A. Willard, secretary of said
3 company, this summons, and by delivering to said C. A. Willard, secretary, personally, a copy thereof, this nineteenth day of July, A. D. 1878.

"HENRY FINK,
"*Marshal,*
"By W. A. NOWELL,
"*Deputy.*"

Fees, $8.54.

JULY 22, 1878.

This day came the district attorney and filed his complaint, as follows:

Complaint.

United States circuit court for the eastern district of Wisconsin.

THE UNITED STATES OF AMERICA
vs.
THE E. E. BOLLES WOODEN WARE COMPANY.

The complaint of the plaintiff respectfully shows to the court and alleges:

That the defendant is, and has been since some time in the year one thousand eight hundred and seventy-five, a corporation organized under and pursuant to the laws of the State of Wisconsin, and having its place of business at West Depere, in the said eastern district of Wisconsin.

That since the date of its said organization the defendant has come into possession of a large quantity of material of and belonging to the United States, the plaintiff herein, suitable for use in and about its business of manufacturing wooden ware at West Depere, aforesaid.

4 The following is a more definite description of said material, to wit: 5,000 loads of pine, 5,000 loads of ash, 5,000 loads of elm, 5,000 loads of oak, 5,000 loads of maple; said loads each containing

from half a cord to a cord of material, and being cut and taken from the lands of the United States known as the Oneida Reservation, within the district aforesaid, without right or authority.

That all of said material having so come into the possession of the defendant as aforesaid, has been wrongfully converted and applied to its own use by the said defendant, between the date of its incorporation and the present time.

That the value of said material is $10,000. Wherefore the plaintiff demands judgment against the defendant for that amount of damages, and costs of suit.

G. W. HAZELTON,
U. S. Att'y.

AUGUST 6, 1878.

This day came L. S. Dixon, esq., and filed his appearance as attorney for said defendant, with notice of retainer, &c., as follows:

Appearance, notice of retainer, and demand for copy of complaint.

Circuit court of the United States for the eastern district of Wisconsin.

THE UNITED STATES
vs.
THE E. E. BOLLES WOODEN WARE COMPANY.

5 SIR: Please to take notice that the defendant, E. E. Bolles Wooden Ware Company, appears in this action, and that I am retained as attorney for said defendant therein, and demand that a copy of the complaint be served on me at my office in Mitchell building, in the city of Milwaukee, county of Milwaukee, State of Wisconsin.

Dated Aug. 6th, 1878.

Yours, &c.,

L. S. DIXON,
Defendant's Att'y.

To G. W. HAZELTON, Esq.,
U. S. District Att'y for said District.

SEPTEMBER 2, 1878.

This day came the defendant, by its attorney, and filed its answer, as follows:

Answer.

U. S. circuit court, east. dist. of Wisconsin.

THE UNITED STATES OF AMERICA
vs.
THE E. E. BOLLES WOODEN WARE COMPANY.

The above-named defendant, by L. S. Dixon, its attorney, answering the complaint herein, denies the same and each and every allegation thereof.

L. S. DIXON,
Def'ts Att'y.

6 And now, at this same term, to wit, January term, A. D. 1879, and on the fourteenth day of said term, to wit, on the twenty-

fourth day of January A. D. 1879, present, the Hon. Charles E. Dyer, district judge, presiding, the following proceedings were had, to wit:

Trial.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE E. E. BOLLES WOODEN WARE COMPANY, defendant. } At law.

This day came the district attorney, Mr. G. W. Hazelton, and the defendant, by its counsel, Mr. L. S. Dixon, and the issue herein came on to be tried. Whereupon a jury was called to try the same, who came, to wit, George T. Cole, Henry E. Dickinson, Truman G. Wright, Stephen Warren, John C. Schroeling, F. S. Capron, Charles J. Jackson, J. C. U. Niedermann, R. B. Allen, Charles Fricke, Joseph H. Town, and Thomas Graham, twelve free, honest, and lawful men of the district, who were severally sworn and empannelled, and the trial not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the fifteenth day of said term, to wit, on the 25th day of January, A. D. 1879, the following proceedings were had, to wit:

This day came the district attorney and the defendant, by its
7 counsel, and the trial of the issue herein was resumed, and not being concluded, the same was adjourned until Monday morning next.

And afterwards, to wit, on the sixteenth day of said term, to wit, on the 27th day of January, A. D. 1879, the following proceedings were had, to wit:

This day came the district attorney and the defendant, by its counsel, and the trial of the issue herein was resumed, and not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the seventeenth day of said term, to wit, on the 28th day of January, A. D. 1879, the following proceedings were had, to wit:

This day came the district attorney and the defendant, by its counsel, and the trial of the issue herein was resumed, and not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the eighteenth day of said term, to wit, on the 29th day of January, A. D. 1879, the following proceedings were had, to wit:

This day came the district attorney and the defendant, by its counsel, and the trial of the issue herein was resumed, and not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the nineteenth day of said term, to
8 wit, on the 30th day of January, A. D. 1879, the following proceedings were had, to wit:

This day came the district attorney and the defendant, by its counsel, and the trial of the issue herein was resumed, and the jurors of the jury aforesaid being charged by the court, retired to their room under the charge of a sworn officer, to deliberate upon their verdict, and with leave to bring in a sealed verdict to-morrow morning.

And afterwards, to wit, on the twentieth day of said term, to wit, on the 31st day of January, A. D. 1879, the following proceedings were had, to wit:

Verdict of the jury.

This day came the district attorney and the defendant, by its counsel, and the jurors of the jury aforesaid came into court with a sealed verdict, and on their oaths aforesaid, respectively do say that they find the issue herein in favor of the United States, plaintiff, and assess the damages to the said plaintiff at the sum of eight hundred and fifty dollars. And came the defendant, by its counsel, and moved the court for a new trial, for reasons filed, as follows:

Motion for new trial.

Circuit court of the United States, eastern district of Wisconsin.

UNITED STATES
ag'st
THE E. E. BOLLES WOODEN WARE CO.

9 And now comes the defendant, by L. S. Dixon, its attorney, and moves the court for a new trial in this action on the grounds that verdict is against law and against evidence, and because the court erred in its charge to the jury.

L. S. DIXON,
Att'y for Def't.

And afterwards, to wit, on the seventy-eighth day of said term, to wit, on the 19th day of April, A. D. 1879—present, the honorable Thomas Drummond, circuit judge, presiding, and the honorable Charles E. Dyer, district judge—the following proceedings were had, to wit:

Order granting a new trial.

This day came the district attorney and the defendant, by its counsel, and the motion of said defendant for a new trial came on to be heard and was argued by counsel and submitted. Upon consideration whereof it is ordered by the court that a new trial be and is hereby granted.

APRIL 23, 1879.

This day came the parties by their attorneys and filed their stipulation of facts, as follows:

Stipulation of facts.

Circuit court of the United States for the eastern district of Wisconsin.

THE UNITED STATES
vs.
THE E. E. BOLLES WOODEN WARE COMPANY.

10 This cause is submitted to the court without a jury upon the facts stipulated by and between the parties, as follows:

The defendant is a corporation engaged in the manufacture of wooden ware at West Depere, in this State, and has been such corporation, carrying on that business, since December 1st, 1875. Near the locality mentioned is what is known as the Oneida reservation, which is a large tract of land belonging to the government, and reserved for the occupancy of the Oneida tribe of Indians, and upon which these Indians live. Many of these Indians are farmers, having considerable tracts of land upon said reservation cleared and under cultivation, and pursuing agriculture and husbandry for a livelihood, according to the course and custom of the whites. By much the larger portion of said reservation is uncultivated or timbered land, or lands from which the timber has been partially removed by cutting or by destruction from fires, and during the period involved in this litigation some of said Indians were engaged in cutting and removing and clearing portions of said lands for the purpose of improvement as farming lands.

This action is brought by the United States to recover from the defendant the value of timber and material alleged to have been wrongfully cut and removed from the reservation and sold to the defendant at various times between the first day of December, 1875, and the time of the commencement of this action, which was July the 19th, 1878.

11 It is agreed that the defendant within the time above mentioned purchased and received from divers members of the said Oneida tribe of Indians, and in various small quantities, two hundred and forty-two and six-sevenths ($242\frac{6}{7}$) cords of ash timber or wood suitable for manufacturing purposes, which was cut and removed from said reservation by the Indians selling the same, but not for the purpose of clearing and improving the land for agricultural purposes. The cutting and removal were for the purpose of selling the wood or timber at the best price that could be obtained therefor. The price paid by the defendant therefor at the village of West Depere, was the sum of three dollars and fifty cents per cord, which was the fair and actual market value thereof at said village, and amounted in the whole to the sum of $850.00 for said $242\frac{6}{7}$ cords of wood or timber.

It is further agreed that the value of said wood or timber on the stump or in the tree, after the same was felled, at the place of cutting upon the reservation was twenty-five cents per cord, or the sum of $60.71 in the whole, and that the additional value thereof, to wit, $3.25 per cord at the village of West Depere, was the increased value bestowed upon said wood or timber by the labor of cutting up and preparing the same for market, and hauling and delivering the same at West Depere, which was a distance of ten or twelve miles from

12 the places on said reservation from which said wood or timber was cut and removed.

It is further agreed that the defendant was an innocent purchaser of said wood or timber, and that there is no occasion to impute to the defendant any intentional wrong or misconduct, or bad faith in the purchase thereof, and that this is not a case calling for vindictive or punitory damages.

Dated at Milwaukee, this 23rd day of April, A. D. 1879.

G. W. HAZELTON,
U. S. Att'y.

L. S. DIXON,
Att'y for Def't.

And afterwards, to wit, on the eighty-first day of said term, to wit, on the 23rd day of April, A. D. 1879—present, the honorable Thomas Drummond, circuit judge presiding, and the honorable Charles E. Dyer, district judge—the following proceedings were had, to wit:

Trial before the court.

THE UNITED STATES OF AMERICA
vs.
THE E. E. BOLLES WOODEN WARE COMPANY. } At law.

This day came the district attorney and the defendant, by its counsel, Mr. L. S. Dixon, and the issue herein came on to be tried upon the said stipulation of facts herein filed, when the said counsel waived a
13 jury, and consented that the issue be tried by the court pursuant to their stipulation herein filed, as follows:

Stipulation waiving jury.

Circuit court of the United States for the eastern district of Wisconsin.

THE UNITED STATES
vs.
THE E. E. BOLLES WOODEN WARE COMPANY.

It is hereby stipulated by and between the parties to the above-entitled action that the same may be tried and determined by the court without the intervention of a jury, the trial thereof by jury being hereby waived.

Dated this 23rd day of April, A. D. 1879.

G. W. HAZELTON,
U. S. Att'y.
L. S. DIXON,
Att'y for Def't.

Finding and judgment.

Whereupon the court proceeded to try said issue, and the trial being concluded, the court finds the issue in favor of the plaintiff, and doth assess the damages to the said United States, plaintiff, at the sum of eight hundred and fifty dollars.

Whereupon it is considered and adjudged by this court now here that the said United States, plaintiff, do have and recover of the said defendant, The E. E. Bolles Wooden Ware Company, the sum of eight hundred and fifty dollars damages, so as aforesaid assessed by the court, together with five hundred dollars and thirty-four cents, the
14 costs of the said United States about their said suit in this behalf by them expended, and that they have execution therefor.

Judgment-roll signed April 23rd, A. D. 1879.

Damages, $850.00; costs, 500.34—$1,350.34.

EDWARD KURTZ, *Clerk.*

And same day (April 23, 1879), certificate of division of opinion filed, as follows:

Certificate of division of opinion.

Circuit court of the United States for the eastern district of Wisconsin.

THE UNITED STATES
vs.
THE E. E. BOLLES WOODEN WARE COMPANY.

Be it remembered that on this 23rd day of April, 1879, this case came for trial upon the issue in the above-entitled cause, before the honorable Thomas Drummond, circuit judge, and the honorable Charles E. Dyer, district judge, without a jury, the parties having, by stipulation in writing filed with the clerk, waived a jury, and thereupon the cause was submitted to and argued before the court upon the facts stipulated, as follows:

"The defendant is a corporation engaged in the manufacture of wooden ware at West Depere in this State, and has been such
15 corporation carrying on that business since December 1st, 1875. Near the locality mentioned is what is known as the Oneida reservation, which is a large tract of land belonging to the government and reserved for the occupancy of the Oneida tribe of Indians, and upon which these Indians live. Many of these Indians are farmers, having considerable tracts of land upon said reservation cleared and under cultivation, and pursuing agriculture and husbandry for a livelihood, according to the course and custom of the whites. By much the larger portion of said reservation is uncultivated or timbered land, or lands from which the timber has been partially removed by cutting or by destruction from fires, and during the period involved in this litigation some of said Indians were engaged in cutting and removing and clearing portions of said lands for the purpose of improvement as farming lands.

"This action is brought by the United States to recover from the defendants the value of timber and material alleged to have been wrongfully cut and removed from the reservation and sold to the defendant at various times, between the first day of December, 1875, and the time of the commencement of this action, which was July the nineteenth, 1878.

"It is agreed that the defendant, within the time above mentioned, purchased and received from divers members of the said Oneida tribe of Indians, and in various small quantities, two hundred and
16 forty-two and six-sevenths ($242\frac{6}{7}$) cords of ash timber or wood, suitable for manufacturing purposes, which was cut and removed from said reservation by the Indians selling the same, but not for the purpose of clearing and improving the land for agricultural purposes. The cutting and removal were for the purpose of selling the wood or timber at the best price that could be obtained therefor. The price paid by the defendant therefor at the village of West Depere was the sum of three dollars and fifty cents per cord, which was the fair and actual market value thereof at said village, and amounted in the whole to the sum of $850.00 for said $242\frac{6}{7}$ cords of wood or timber.

"It is further agreed that the value of said wood or timber on the stump or in the tree after the same was felled, at the place of cutting, upon the reservation, was twenty-five cents per cord, or the sum of $60.71 in the whole, and that the additional value thereof, to wit, $3.25 per cord at the village of West Depere, was the increased value bestowed upon said wood or timber by the labor of cutting up and preparing the same for market, and hauling and delivering the same at

West Depere, which was a distance of ten or twelve miles from the places on said reservation from which said wood or timber was cut and removed.

"It is further agreed that the defendant was an innocent purchaser of said wood or timber, and that there is no occasion to impute to the defendant any intentional wrong or misconduct, or bad faith in the purchase thereof, and that this is not a case calling for vindictive or punitory damages."

And on the trial of this cause it occurred as a question:

Whether the plaintiff was entitled to recover from the defendant the value of said wood, or timber, at the place where the same was cut and severed upon the said reservation, to wit, the sum of $60.71, or the value thereof, at the village of West Depere, as shown by the facts stipulated, to wit, the sum of $850.00, on which said question the said judges were opposed.

And thereupon the said circuit judge directed judgment in favor of the plaintiff for the value of said wood or timber, at the village of West Depere, and judgment was entered for the sum of $850, the value thereof, at said village.

Wherefore, on motion of the defendant, by its counsel, that the point on which this disagreement hath happened may, during this term, be stated under the direction of the judges, and certified under the seal of this court, and made a part of the record of this cause, to the Supreme Court of the United States to be finally decided, it is ordered that the foregoing facts of the case, and the question on which the disagreement of opinion hath happened, and which is made under the direction of the judges, be certified, according to the request of the defendant, by its counsel, and the law in that case made and provided.

THOMAS DRUMMOND.

JUNE 19, 1879.

This day came the defendant and filed its bond, with E. E. Bolles and C. A. Willard, as sureties, in the penalty of two thousand dollars, conditioned that the said defendant shall prosecute a writ of error to effect, and answer all damages and costs if it fail to make its plea good; which bond is approved by the district judge, and is as follows:

Bond for supersedeas.

Know all men by these presents, that we, the E. E. Bolles Wooden Ware Co., as principal, and E. E. Bolles and C. A. Willard, as sureties, are held and firmly bound unto the United States of America in the full and just sum of two thousand dollars, to be paid to the said United States, its successors, or its certain attorney or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this ninth day of June, in the year of our Lord one thousand eight hundred and seventy-nine.

Whereas lately, at a term of the circuit court of the United States in and for the eastern district of Wisconsin, in a suit depending in said court between the United States, plaintiff, and The E. E. Bolles Wooden Ware Co., defendant, a judgment was rendered against the said The E. E. Bolles Wooden Ware Co. for eight hundred and fifty dollars damages, and costs of suit, taxed at five hundred dollars and

thirty-four cents; and the said E. E. Bolles Wooden Ware Co. having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next:

Now, the condition of the above obligation is such that if the said E. E. Bolles Wooden Ware Co. shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

E. E. BOLLES WOODEN WARE CO., [L. S.]
P'r E. E. BOLLES, *Pres't.*
E. E. BOLLES. [L. S.]
C. A. WILLARD. [L. S.]

Approved by—

CHAS. E. DYER,
Judge.

Whereupon, it is ordered by the court that execution be superseded, and a writ of error and citation issued, and a copy of said writ of error lodged for the defendant in error.

20 UNITED STATES OF AMERICA.
Eastern District of Wisconsin, ss:

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the foregoing writings annexed to this certificate with their originals now on file and remaining of record in my office, and that they are true copies of such originals, and correct transcripts therefrom, being a full and complete transcript of the record and proceedings in the case of the United States of America vs. The E. E. Bolles Wooden Ware Company.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in said district, this 28th day of July, in the year of our Lord one thousand eight hundred and seventy-nine, and the Independence of the United States the 104th.

EDWARD KURTZ, *Clerk.*

21 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the judges of the circuit court of the United States of America for the eastern district of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between the United States of America, plaintiff, and The E. E. Bolles Wooden Ware Company, defendant, a manifest error hath happened, to the great damage of the said The E. E. Bolles Wooden Ware Company, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: You are hereby commanded, if judgment be therein given, that then, under your seal, dis-

tinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, that of right and according to law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 19th day of June, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the 103rd.

EDWARD KURTZ,
Clerk U. S. Circuit Court, East'n Dist. Wisconsin.

22 UNITED STATES OF AMERICA, *ss:*

[SEAL.] To the United States of America, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Wisconsin, wherein The E. E. Bolles Wooden Ware Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Charles E. Dyer, district judge of the United States for the eastern district of Wisconsin, at the city of Milwaukee, in the said district, this 19th day of June, A. D. 1879, and of the Independence of the United States the 103rd.

CHAS. E. DYER, *Judge.*

I accept service of above citation this 30 day of August, A. D. 1879.

G. W. HAZELTON,
U. S. Att'y.

(Indorsement on cover:) No. 94. The E. E. Bolles Wooden Ware Company, plaintiff in error, vs. The United States. E. Wisconsin C. C. U. S. Filed 17th October, 1879.

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SUPREME COURT OF THE UNITED STATES.

(**No. 94.**)

OCTOBER TERM---A. D. 1882.

THE E. E. BOLLES WOODEN WARE COMPANY,

Plaintiff in Error,

vs.

THE UNITED STATES,

Defendant in Error.

Writ of Error to the Circuit Court of the United States, Eastern District of Wisconsin.

BRIEF FOR PLAINTIFF IN ERROR.

SAMUEL D. HASTINGS, JR.

ATTORNEY FOR PLAINTIFF IN ERROR.

GREEN BAY, WIS.
M. D. KIMBALL, PRINTER,
1882.

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SUPREME COURT OF UNITED STATES.

(No. 94.)

OCTOBER TERM---A. D. 1882.

THE E. E. BOLLES WOODEN WARE COMPANY,

Plaintiff in Error,

vs.

THE UNITED STATES,

Defendant in Error.

Writ of Error to the Circuit Court of the United States, Eastern District of Wisconsin.

BRIEF FOR PLAINTIFF IN ERROR.

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1882.

16-432

OFFICE SUPREME COURT U.S.
FILED
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JAMES H. MCKENNEY, Clerk.

SUPREME COURT OF UNITED STATES.

(**No. 94.**)

OCTOBER TERM---A. D. 1882.

THE E. E. BOLLES WOODEN WARE COMPANY,

Plaintiff in Error,

vs.

THE UNITED STATES,

Defendant in Error.

Writ of Error to the Circuit Court of the United States, Eastern District of Wisconsin.

BRIEF FOR PLAINTIFF IN ERROR.

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IN THE

SUPREME COURT OF UNITED STATES.

(No. 94.)

OCTOBER TERM---A. D. 1882.

THE E. E. BOLLES WOODEN WARE COMPANY,

Plaintiff in Error,

vs.

THE UNITED STATES,

Defendant in Error.

Writ of Error to the Circuit Court of the United States, Eastern District of Wisconsin.

BRIEF FOR PLAINTIFF IN ERROR.

FACTS.

This case is brought by the United States to recover from the plaintiff in error for 242 6-7 cords of wood. The facts were stipulated and the cause tried without a jury. The facts as shown by the stipulation are briefly these: The plaintiff in error is a

corporation engaged in the manufacture of wooden ware at West DePere, Wisconsin, ten or twelve miles from the Oneida Reservation. This reservation is a large tract of land owned by the United States, reserved for, and occupied by, the Oneida Tribe of Indians. Many of these Indians clear and cultivate the soil according to the course and custom of the whites, and a considerable portion of the reservation is cleared and cultivated. But the larger portion of the reservation is uncultivated, or timbered land, or lands from which the timber has been partially removed by cutting or by destruction by fire, and during the period involved in this litigation, some of said Indians were engaged in cutting and removing timber in clearing portions of said lands for agricultural purposes. This wood was purchased by the plaintiff in error, at West DePere at various times between December 1st, 1875 and July 19th, 1878, in small quantities, by the load, from various members of said tribe, in good faith and without any knowledge on its part that the wood had been wrongfully taken from the reservation by the Indians. This wood, or timber, was cut by the Indians who sold it, from the reservation, for sale on the market, and not for the purpose of clearing and improving the land for agricultural purposes. It was worth at the time and place purchased by the plaintiff in error $3.25 per cord, or $850.00, which was the price paid for it. The value of the same wood or timber, "in the tree, after the same was felled, at the place of cutting upon the Reservation, was twenty five cents per cord or $60.71 in the whole, and the additional value thereof to-wit $3.25 per cord at the village of West DePere, was the increased value bestowed upon the wood or timber by the

labor of cutting up and preparing the same for market and hauling and delivering the same at West DePere."

The Circuit and District judges differed in their opinion, on the question whether the defendant in error was entitled to recover the value of the wood at the place when cut and severed upon the reservation, or its value, at the village of West DePere. The case comes here upon certificate of division of opinion. Judgment was entered against the plaintiff in error for the full value of the wood at West DePere.

ERRORS.

1st. The Circuit Court erred in holding that the plaintiff was entitled to recover from the defendant the value of the wood, or timber, at the village of West DePere.

2d. The Circuit Court erred in refusing to hold that the proper rule of damages was the value of the wood or timber where the same was cut or severed upon the reservation.

3d. The Circuit Court erred in rendering judgment for the United States for a greater amount than sixty and 71-100 dollars and costs.

POINTS AND ARGUMENT.

MEASURE OF DAMAGES.

The plaintiff in error, being an innocent purchaser of the property, the measure of its liability

is the value of the timber, independent of the increase in value given to it by the labor of the Indians.

I.

"All rules of damages are referred by law to one of two heads, either compensation or punishment. Compensation is to make the party injured whole. Exemplary damage is something beyond this, and inflicted with a view, not to compensate the plaintiff, but to punish the defendant." *Dillon C. J.* 1 *Dillon* 71-2.

We consider the former, compensation, from the standpoint of the injured party; the latter, punishment, from that of the party from whom redress is sought.

The injnred party should be made whole for his actual loss. When the law has awarded him this, it has done its full duty towards him. Whether the party from whom redress is sought is liable to respond in a greater amount depends upon whether he is a wilful and intentional or an innocent or accidental wrongdoer. Whether in addition to redressing the injury he should be punished for the motive or the manner of its infliction. Compensation is complete when a pecuniary loss is made good by pecuniary equivalent. Punitary damages only follow intentional wrong or gross negligence.

Testing the government's rights by the rule of compensation and it is certainly redressed when it receives the value of its property where it lost it.

Suppose that instead of being worked into cord wood and transported to market, the timber had

been burned on the spot where felled, the loss to its owner would have been the same and it would have been no greater had the timber been manufactured into the most costly articles that it was capable of producing and then destroyed. All the pecuniary injury that the owner can suffer is the loss of his property. That he loses when it is taken from him in the condition in which he owned it.

II.

The English courts are in entire harmony with this view.

The question first arose in *Martin vs. Porter* 5 *M. and W.* 351 *in* 1839. The action was for breaking and entering, and carrying away coal. The court held that the plaintiff was entitled to recover the value of the coal as a chattel, as soon as it existed as a chattel, which value would be its price at the pit's mouth, after deducting the expense of carrying the coals from the place in the mine where they were got, to the pit's mouth.

This case was followed in *Morgan vs. Powell* 3 *Adol. & El.* (*N. S.*) 218 *S. C.* 43 *E. C. L.* 736 *in* 1842, which was also trespass for breaking a mine, digging and carrying away coal; and again in *Wild vs. Holt* 9 *Mees. & Wels.* 672, 1842. These were all cases where the question arose against a wilful or negligent trespasser.

In *Wood vs. Morewood* 3 *Adol. & Ellis* 440. *S. C.* 43 *E. C. L.* 810, 1841, the action was *trover* for conversion of the coal after the defendant had wrongfully re-

moved it from the plaintiff's land. Park, who gave the principal opinion in *Martin vs. Porter*, after approving of the rule of that case, drew a distinction between the wilful trespasser and innocent party, and told the jury, that "if they thought that the defendant was not guilty of fraud or negligence but acted honestly and fairly in the full belief he had a right to do what he did, they might give the fair value of the coals, as if the coal fields had been purchased from the plaintiff." This case establishes the principle of *actual compensation* in an action against an innocent though responsible party regardless of the form of action, and that the element of punitive damages entered in to the rule of *Martin vs. Porter* is evident from the language of Park. B. in *Wild vs. Holt.* He says "The case of *Martin vs. Porter* establishes that, as against a *wrong-doer* no such abatement ought to be made, but that the jury are *at liberty* to give as damages the full value of the coals when they just exist as chattel, in consequence of the trespass."

The question next arose in 1867 in *Hilton vs. Woods L. R.* 4 *Eq.* 438 in which the rule of *Wood vs. Morewood* was followed. Vice chancellor Malins refering to the cases of *Martin vs. Porter* and others said: "It is clear upon the authorities, a different principle is applicable when coal is taken inadvertently, or as in the present case under a *bona fide* belief of title, and when it is taken fraudulently with full knowledge that he is doing wrong, or in other words committing robbery."

In *Jegon vs. Vivian L R.* 6 *ch.* 760 the same rule is adopted. The rule of *Martin vs. Porter* and *Morgan vs. Powell* was strongly pressed, but the chancellor said:

"It strikes me as a strong measure to give a man, instead of the value of his coal, the great advantage of having it worked without any expense for getting and hewing. It seems a rough and ready mode of doing justice, though the remark that a wilful trespasser ought to be punished, is worthy of observation, and further, as was said by one of the judges, when you deprive a man of his property in this way you deprive him of the management and control of his own property, and he might have made a better bargain. All that however is a matter of speculation, and it seems to me the judges have founded their decision upon the ground of wilful trespass as in *Martin vs. Porter* where Baron Park expresses himself well pleased with the rule. But the same learned Baron, in *Wood vs. Morewood* held that where there was a *bona fide* claim of title the trespasser could be allowed for hewing as well as for other expenses."

The *United Merthy Collieries Company* case L. R. 15 Eq. Cases 46, decided 1872, presented the same question. The court held that although the trespass was fully proved, yet as there was no suggestion of fraud, it was a case for the application of the more lenient rule, and held, that the defendant was liable only for the value of the coal, deducting the cost of severance and carrying it to the pit's mouth.

Sir James Bacon, V. C., says: "The principle of the decision is that the plaintiff, although he has suffered a wrong, shall not have any more than he would have had if the wrong had not been committed. That I take to be the clear and plain principle. If he had himself severed the coal, he could only have done so by means of disbursements. If

he had brought it to the pit's mouth when severed, he could only have done so by means of disbursements.

The question finally reached the House of Lords in 1880, in *Livingston vs. Merthyn Coal Co.* 42 *L. T.* (*N. S.*) 334, and the rule of actual compensation, in an action against an innocent party, was affirmed, in the strongest terms. Lord Chancellor Cairns says, after referring to the fact that the defendant was not a wilful trespasser: "The value is that which he could have obtained from some body else who would have come and taken the coal as it stood *in situ*, and would have worked it and turned it to account."

Lord Hatherley said: "There is no doubt, that if a man furtively, and in bad faith, robs his neighbor of his property, and because it is under ground is probably for some little time not detected, the Court of Equity in this country will struggle, or I would rather say, will assert its authority, to punish the fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allowance in respect of what he has so done, as would have been justly made to him if the parties had been working by agreement." Again, "when once we arrive at the fact that an inadvertance has been the cause of the misfortune, then the simple course is to make every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner, so far as is possible under the circumstances of the case, the full value of that which cannot be restored to him in specie."

Lord Blackburn, after referring to the rule against the wrong-doer, as established by the law courts, quotes the rule of *Wood vs. Morewood* and says, "that was the rule to be applied where it was an innocent person that did the wrong; that was the rule followed in the case of *Jegon vs. Vivian L. R.* 6 *ch.* 742, which has been so much mentioned. It was followed in the Court of Chancery, and, so far as I know, it has never been questioned since, that where there is an innocent wrong-doer the point that is to be made out for the damages is, as was expressed in the minutes of the decree: 'the defendants to be charged with the fair value of such coal and other minerals at the same rate, as if the mines had been purchased by the defendants at the fair market value of the district.'"

These are all the English cases that I have found where the land owner has sued for that which was a part of the realty, and has been wrongfully severed and converted into a chattel, and they all rest upon the principle of actual compensation to the injured party, which is the value of his property less the increase given to it by the labor of conversion, and punishment, when the action is against the wilful wrong doer. The theory of continued ownership of the plaintiff in the property in its improved state was suggested as a ground for sustaining the decision in *Martin vs. Porter*, but it was disregarded in that very case as the plaintiff was not allowed the full value of the coal on the plaintiff's premises, and it was directly repudiated in *Wood vs. Morewood* and all the subsequent cases as against an innocent trespasser.

III.

Turning to the American cases we find less harmony, but a strong tendency to return to the principle of compensation wherever it has been departed from. The best reasoned cases limit the recovery to this. A few mining cases blindly follow *Martin vs. Porter*, giving the value of the coal when it first becomes a chattel without deducting the value of the labor of mining, although the reasoning would call for a deduction of that also. The question is one of great importance to the lumbering interests of Wisconsin and Michigan, and has received careful consideration by the courts of those states.

In *Weymouth vs. Ch. & N. W. R. R. Co.*, 17 *Wis.* 550, the defendant took the plaintiff's wood by mistake, at F. and removed it to J., thus materially increasing its value. The action was for the conversion at J. Upon full review of the authorities it was held that the measure of damages was the value of the wood at F., as that was all that the plaintiff had lost.

Single vs. Schneider, 24 *Wis.*, 299 was replevin for lumber manufactured from logs, wrongfully cut by defendant from plaintiff's land. It was held that the measure of damages was the value of the property when replevied, less the addition to its former value, as trees, made by the defendant's labor, the cutting having been done by mistake.

This case was followed in *Hungerford vs. Redford* 29 *Wis.*, 345.

Single vs. Schneider was again before the Court in 30 *Wis.*, 570, and the principle of *actual compensation* was adhered to even where it was shown that the cutting was intentional. The court say, "It seems

to us that, if the owner is entirely indemnified for the injury he has sustained, it is quite immaterial whether the logs were cut by mistake or intentionally, unless in the latter case the trespass was of such a character as to make the doctrine of exemplary damages applicable," and they think this doctrine applicable only where "fraud, malice, or wanton injury attend the trespass."

Winchester vs. Craig, 33 *Mich.*, 205. Timber was cut by mistake, and transported at great expense, to Ohio. Trover was brought for the conversion at Toledo. Is was held that the measure of damage was the value of timber at Toledo, less the defendant's expenses in cutting and transportation. After a learned review of the authorities and discussion of the principles, the Court say: "In this case each has an interest in the logs: the plaintiff as assignee of the original owner; the defendant by largely increasing their value in good faith. Each should be protected in his rights, and thus as nearly as possible substantial justice be done. To allow plaintiff to recover what he here seeks would be to break down all distinction between the wilful and involuntary trespasser, a distinction which is based upon a sound legal principle and which is applied in all other forms of action."

Robertson vs. Jones 71 *Ill.*, 405, was trespass for entering plaintiff's mine, digging and carrying away coal. *Martin vs. Porter* was followed, and the plaintiff was allowed to recover the value of the coal at the mouth of the pit, less the cost of removing it from the mine, after it was dug, to the pit's mouth.

This rule was followed in a similar action in *Ill. & St. Louis R. R. and Coal Co. vs. Ogle* 82 *Ill.*, 627, (1876).

In *McLean Co. Coal Co. vs. Long*, 81 *Ill.* 359, (1876) the same question arose in an action of *trover*, brought against defendant Long after he had mined and sold plaintiff's coal, demand having been made before action was brought. The same rule of damages was applied. Brease J. says: "The ordinary principle is, that a party is entitled to recover compensation only for the damage he has actually sustained. No matter what may be the form of action, a different rule of damages does not prevail in trespass for breaking and entering a coal mine and carrying away coals, and *trover* for the coals, except when circumstances of aggravation are relied on in trespass. The rule is the same in both forms of action."

This case was followed by *McLean Co. Coal Co vs. Lennon*, 91 *Ill.*, 561 (1879), which was also *trover*.

It will be noticed of these cases that they do not deduct from the value of the coal the cost of severing it from the realty but allow a recovery, even against an accidental trespasser, of its value when it first becomes a chattel. This feature of the rule is contrary to the reasoning of the courts which adopt it and seems to be followed as an arbitrary rule applicable to ~~many~~ mining cases. 26 Am. Rep. 528, note.

The rule of the Illinois courts is also adopted in Maryland. *Barton Coal Co. vs. Cox.* 39 *Md.* 1, and *Franklin Coal Co. vs. McMilian* 49 *Md.* 549. In the latter case it appeared that the defendant was an innocent trespasser, and a strong dissenting opinion was filed by Robinson J., protesting against the appli-

cation of the rule to such a case. After a full review of the authorities and text books, showing the distinction, he says, "Although the rule in the Barton coal case may be applied to a wilful trespasser, or where coal is taken inadvertently, which in a legal sense may be construed as negligence, yet where it is mined in good faith, under a claim of title, it does seem to me, with great deference to the opinion of the majority of the Court, that there is no reason why the plaintiff should recover, not only compensatory damages, but also the increased value of the coal arising from the labor bestowed upon it in mining and preparing it for market."

Austin vs. Huntsville Coal and Mining Co., Mo. 1880 –12 Cent. L. J. 230 repudiates the arbitrary distinction of the Illinois and Md. courts, and allows only actual compensation where there is no occasion for punitive damages. Sherwood Ch. J. says, "In England, and in some of our sister states, the result reached in cases of the character under discussion, and which gave origin to the rule which plaintiff invokes, is no doubt owing to technicalities from which we, happily, are freed, since we have but one form of action in this State, and consequently are not hampered by mere matters of form in seeking redress for injury done. This being the case, there would seem to be neither reason, justice, nor consistency in paying a party for his labor in raising the coal to the mouth of the pit and paying him nothing for his labor in severing it from the free hold—i. e. in getting it into such condition that it could be delivered at the mouth of the shaft." And it was held that in the absence of wilful wrong or other circumstances warranting punitive damages

the true rule of damages is the value of the coal at the mouth of the shaft less the cost of the labor to the defendant in severing it from the freehold and raising it to the mouth of the shaft.

The Penn. Courts are in full harmony with our position.

Forsyth vs. Wells, 41 *Pa. St.*, 291 was an action to recover the value of coal taken from plaintiff's mine. The Court say: "Where there is no wrongful purpose or wrongful negligence in the defendant, compensation *for the real injury is the* purpose of all remedies, and so long as we shall bear this in mind we shall have but little difficulty in managing the forms of action, so as to secure a fair result. If the defendant was guilty of no intentional wrong he ought not to have been charged with the value of the coal after he had been at the expense of mining it, but only with its value in place, and with such other damages to the land as his mining may have caused."

Herdie vs. Young, 55 *Pa. St.*, 177 was replevin for logs cut by defendant by mistake on the plaintiff's land. The logs were driven to the boom by the defendant, and there replevied. The same rule of damages was applied. The Court say, "as remarked by Lawrie Ch. J. in *Morrison vs. Robinson*, 7 *Easey*, 458, our natural sense of justice furnishes the ground and measure of compensation for injuries done by one man to the property of another, and demands adequate remedy to obtain it. In trespass for mesne profits, compensation was therefore held to be the measure of damage, and the

defendant will be allowed for the value of permanent improvements erected by one whose title he has bought.** Such compensation merely would have been the standard in this case, had ejectment *quare clausum fregit* been brought instead of replevin. The value of timber on the ground would have measured the mesne profits. Upon principle and analogy it is unjust to give to the plaintiff the advantage of the labor and expense of the defendant's cutting and hauling the logs and driving them to the boom. Yet if we confine our view to the condition of the property at the time of the replevy, instead of going back to the time of the taking, this would be the mere effect of a change in the form of action and not of an alteration of the circumstances.*** In case of inadvertent trespass, or one done under a *bona fide* but mistaken belief of right, this (the true standard of damages), would generally be the value of the logs at the boom (the place of replevy) less the cost of cutting, hauling, and driving to the boom."

The same principles are applied in *Lykens Valley Coal Co. vs. Dock* 62 *Pa. St.* 232 and *Coleman's Appeal,* 62 *Pa St.* 278.

The question was very thoroughly and ably considered by Sup. Court of Nevada in *Waters vs. Stevenson,* 13 *Nev.* 157. The action was to recover damages for ore taken from plaintiff's mine by defendant. It was held that the proper rule of damages was the value of the ore less the cost of mining it. The opinion closes thus: "A careful examination

of the authorities has convinced us that there is a growing inclination among all courts, when it can be done, to apply the only safe and just rule in actions for damages, whether *ex contractu* or *ex delictu*, and that is, to give the injured party as near compensation as the imperfections of human tribunals will permit. This is the aim, the ideal of the law, and it is the duty of courts to come as near it as possible in practice, and although courts differ as to the method of ascertaining the actual loss, as well as to what constitutes actual loss, still there is a refreshing unanimity of opinion that such loss only, when ascertained, ought to be compensated in the absence of fraud, malice or culpable negligence."

Maye vs. Yappen, 23 *Cal.*, 306 was an action to recover damages for removing gold-bearing earth from plaintiff's land. The measure of damages was held to be the value of the earth at the time it was separated from surrounding soil. This was ascertained by deducting the expense from the value of the gold.

In *Goller vs. Felt*, 30 *Cal.* 482, a similar action, the actual damage was held to be the value of gold less expense of digging the gold-bearing earth and separating it from the realty so as to make it personal property.

Foot vs. Merrill 54 *N. H.* 490 was trespass for breaking and entering plaintiff's enclosure and cutting and carrying away trees. Court say: "The defendant ought only to be liable to compensate him according to the magnitude of his loss.** If the trees are worth no more to the plaintiff to stand than to the defendant to cut into timber at that time, their value as timber, with the reasonable expense

of cutting deducted, was the measure of the injury which was done to the plaintiff by cutting them."

Stockbridge Iron Co. vs. Com. Iron Works 102 *Mass.* 80 was an action to recover damages for taking from plaintiff's lands large quantities of ore. In stating the rule of damages the Court say: "The value of the ore is to be estimated as it lay in the bed, and not as it was after the defendants had increased its value by removing it."

Chamberlin vs. Collinson 45 *Iowa*, 429 was an action by lessees of a mine to recover value of ore wrongfully taken from it by the plaintiff. It was held that from the value of the mineral should be deducted rent due under the lease and reasonable cost of mining. The ore was taken in good faith though wrongfully. The Court cite approvingly *Stockbridge Iron Co. vs. Stove Iron Works* 102 *Mass.* 80. *Mayo vs. Taffan* 23 *Cal.* 306 *and Forsyth vs. Wells* 41 *Penn. St.* 291.

Clement vs. Duffy, Iowa, Oct. 21, 1881, 7 *N. W. Rep.* 387. The plaintiff replevied grain in the stack and threshed it, and the suit was decided in defendant's favor, and he was entitled to judgment for the value of the property. Held that he could not recover the value after threshed. Court say: "It is urged by counsel for appellant that the Court erred in deducting from the value of the grain the cost of threshing and marketing; and it is said that where a wrong-doer expends labor upon the property of another he is not entitled to compensation therefor. But in this case it does not appear that the plaintiff knew, when he commenced the action and seized the grain, that it was the defendant's property. He may have acted in entire good faith, believing that he was the

owner. We believe the rule should be limited to wilful wrong-doers. Such seems to have been the opinion of the Court in *Salesbury vs. Cook*, 3 *N. Y.* 379. The cases where the question has arisen are mostly those where it has been claimed that the right of property may be lost by reason of the change of identity. 2 Kt. Com. 363. What is said in *Stewart vs. Philp*, 39 *Iowa* 18 upon the subject, should, we think he considered as applicable to a wilful trespass. In our opinion the expense of threshing and marketing the grain was properly deducted from the market price. Grain is ordinarily held for sale on the market. In stock it is of no value as an article of commerce, and the plaintiff did no more than what the defendant would have been required to do to realize the money upon it."

Ensley vs. Nashville 58 *Tenn.* 144. "The measure of damage for felling and carrying away trees from a tract of land is the value as they stood upon the land, and if their removal impaired the value of the land, damages may be had for such injury."

All the cases thus far cited were actions against the trespasser. *Railway Co. vs. Hutchins* 32 *Ohio St.* 571 was a case against an innocent purchaser from a wilful trespasser. The question is ably and fully discussed, and it is held that the recovery is limited to the value of the timber before enhanced by the labor of the trespasser. Such is the full measure of the plaintiff's loss, and the defendant being innocent cannot be punished by punitive damages.

In a note to the last Ed. of Sedgwick on Dam. 2 vol. 400, it is said "that the better opinion is against allowance of the increased value." Citing in addition to cases before referred to,

Mr. Sedgwick shows, page 401, that by the Civil law the severe rule of damages of some early N. Y. cases is not recognized in any case, and adds, "Nor should the analogous case in regard to real property be overlooked. In trespass for mesne profits, the *bona fide* occupant of lands without notice, who has improved them, is allowed to set off, or recoup, the value of his improvements. And such, as we shall see, is equally the case in regard to personal property, when trespass is brought. Why should not the same equity be extended to the action of trover? I apprehend that whenever the question is distinctly presented, the milder rule will be maintained. Indeed, it has been so intimated in England."

In 2 *Vol.* 500, Mr. Sedgwick sums up his review of the mining cases thus: "The principle to be extracted from these cases is that in trespass, if the defendant has in good faith increased the value of the property, the plaintiff shall not have the benefit of his labor, and this appears to be the rule in this country."

IV.

All that can be said in opposition to this rule is, that the owner does not lose his title to the timber; that the wrong-doer acquires no title by his act; that the owner is entitled to take his property when he can find it; and in trover, to recover its full value at the time of its conversion. Because he cannot be compelled to pay for the additional value, wrongfully added to it, and it cannot be separated, he

must necessarily take the whole, or when he cannot take it, recover its value. And there are some cases that apparently, and one or two that actually sustain this argument. If we examine it on principle we find no difficulty with it.

(1.) It is the *general* rule that in trover the measure of damages is the value of the property at the time and place of conversion, because that is *generally* the measure of the plaintiff's loss. But when such is not the case such is not the rule.

In *Pierce vs. Benjamin* 14 *Pick.* 356, Morton J. says, after stating the general rule in trover: "But there are exceptions and qualifications of this rule as plain and well established as the rule itself. Whereever the property is returned and received by the plaintiff the rule does not apply. And when the property itself has been sold and the proceeds applied to the payment of the plaintiff's debt, or otherwise to his use, the reason of the rule ceases and justice forbids its application. In all such cases the facts may be shown in mitigation of damages."

Baldwin vs. Porter 12 *Conn.* 484. The plaintiff's property was wrongfully seized and sold on an execution against another. He bid it in for less than its value and then brought trover for its conversion. Court say: "No good reason consistently with moral principles, can be suggested, why greater damages should be recovered than have in truth been sustained, except in those cases where the law permits, by way of punitive justice, the recovery of vindictive damages."

Winchester vs. Craig 33 *Mich.* 209.

If then the plaintiff's damage is not the value of the property we find no reason for his recovering that value simply because he has brought that form of action.

(2.) It does not follow that because the land-owner still retains *his* title to *his* timber, and if he gets actual possession of it, must *ex necessitate rei* retain the property so intermixed with it that it is incapable of physical separation, that he must *recover as damages* the value of that intermixed property when he is obliged or elects to sue for the value of *his* property.

Mayne in his treatise on Damages, Page 291 gives, as the true principle, "that the property in the improvement never does, in fact, vest in the original owner, but that as his property in the subject matter continues, he has a right to have it back, either in value or in specie; in the latter case the improvements must follow because they cannot be separated. In the former case they need not," and cites as settling the English law on the point, *Reed vs. Fairbanks* 13 *C. B.* 692. This case was trover for a ship taken by the defendant in an unfinished state, completed and sent to sea. It was held that the damages in trover were its value at the time, "which might be ascertained by taking its value at the place where it was built when completed according to contract, and deducting the amount which it would have been necessary to lay out for that purpose after the conversion." Meade J. said in the course of the argument: "Although it be true that in trover the owner may recover for the conversion of the improved chattel, it does not fol-

low that he is entitled to *recover the improved value as damages.* The proper amount of damages is the amount of pecuniary loss which the plaintiffs have been put to by the defendant's conduct."

Wright J., in *Railway Co. vs. Hutchins* 32 *Ohio St.* 584, sums up the discussion of this question so forcibly that I quote him at length: "It is very true that the wilful trespasser or thief can convey no title to one to whom he sells, however innocent the purchaser may be. But the question right here is, what does 'title' in this connection mean? The original owner has the title to his timber, and *as against the thief*, the title to the result of the thief's labor. The wrong-doer, as it were, being estopped from settling up any claim by virtue of the wrong he has done. Against the innocent purchaser from the thief the original owner still has the 'title' to his timber, but by virtue of what does he now have 'title' to the thief's labor? The estoppel, so to call it, being created by fraud or wrong, exists only against the one guilty of that fraud or wrong, which the purchaser is not, and which is effectual against the wrong-doer; the reason of it does not exist as against the innocent man as to whom it therefore fails. As Judge Cooley says it does not comport with notions of justice and equity, that against those who have done no wrong these owners should recover three times the value of what they have lost. They have never spent one cent of money nor one hour of labor in changing this timber worth one dollar into cord wood worth three. All this was done by some one else, and why should the owner recover for it? If they are compensated for what they have lost, and all they have lost, they are certainly fully

paid, and it is all they should be allowed to recover."

In *Weymouth vs. Ch. & N. W. R. R. Co.* 17 *Wis.* 554, Paine J. says: "In determining the question of recaption, the law must either allow the owner to retake the property or it must hold that he has lost his right by the wrongful act of another. If retaken at all it must be taken as it is found, though enhanced in value by the trespasser. It cannot be restored to its original condition. The law, therefore, being obliged to say either that the wrong-doer shall lose his labor, or the owner lose his right to take his property whenever he may find it, very properly decides in favor of the latter. But where the owner waives the right to reclaim the property itself, and sues for the damages, the difficulty of separating the enhanced value from the original value no longer exists. It is then entirely practicable to give the owner the entire value that was taken from him, which certainly seems to be all that natural justice requires, without adding to it such value as the property may have afterwards acquired by the labor of the defendant. In the case of recaption, the law does not allow it because it is absolute justice that the original owner should have the additional value, but because the wrong-doer has, by his own act, created a state of facts where either he or the owner must lose something. There the law says the wrong-doer shall lose. But if the owner chooses to resort to another remedy, in applying which the law may give him full compensation for all that he has lost, without compelling the wrong-doer to pay more, I see no reason why that should not be the rule."

This position is further discussed and asserted in actions of trover, and replevin where the defendant retains the property, in the following, among many other, cases:

Single vs. Schneider 24 *Wis.* 299.

Hungerford vs. Redford 29 *Wis.* 345.

Single vs. Schneider 30 *Wis.* 570.

McLean Co. Coal Co. vs. Long 81 *Ill.* 359.

Forsyth vs. Wells 41 *Penn. St.* 219.

Wetherbee vs. Green 22 *Mich.* 311.

Winchester vs. Craig 33 *Mich.* 205.

Moody vs. Whitney 38 *Me.* 177.

In 26 Am. Rep. 527, the editor in an able note reviewing many cases says: "Although, as we have seen from the principal case, one cannot demand compensation for his voluntary additions to the value of another's property, without the assent of the owner, in an action for the value of what he has thus bestowed, yet where he stands on the defensive, and is sued for the value of the property, he will be compensated for such additions whenever he has acted in good faith.** This is certainly the law in this country, in trespass and trover, and in replevin where the property itself is not recovered. The rule as to wilful trespassers is undoubtedly different."

The same learned editor, after referring to the early New York cases, commencing with Betts vs. Lee 5 John 348, and ending with Salesbury vs. Coon 3 N. Y. says: "They were all cases of wilful trespass, but in recent N. Y. cases the doctrine as to an unintentional trespasser was differently held."

In *Aborn vs. Mason* 14 *Blatchf.* 403 Court say: "But courts have not been satisfied with a rigid rule which would invariably permit a plaintiff to recover the enhanced value without any deduction for the labor and expenses which, in the absence of fraud, have been bestowed by the defendant upon such property, and have not enforced the rule to its full extent."

V.

These early New York cases frequently cited in opposition to our position do not present questions of damage, but the question before the Court was as to the title to the property, whether the original owner had lost his title and another acquired it.

In *Betts vs. Lee* 5 *John* 348, the plaintiff trespassed on the defendant's land and converted his trees into shingles The defendant took the shingles and the plaintiff sued him for them. Held there could be no recovery because they were the defendants shingles and he had a right to take them.

Curtis vs. Grout 6 *John* 168 was a like case. The plaintiff took the defendant's timber and converted it into coal. The defendant took possession of the coal and the plaintiff sued for it. Held that he could not recover.

Brown vs. Sax 7 *Cow.* 95 was trover for logs, boards and plank. The defendant was a wilful trespasser on the plaintiff's land, took his trees and converted them into the articles sued for. Held that the plaintiff could recover their present value. The pre-

vailing opinion does not discuss the question of damages, but merely cites the cases, holding that the plaintiff had not lost his title.

Sutherland J, discusses the question of damages and protests against recovery of greater damages than the plaintiff's actual loss, unless in case of a wilful and tortious taking.

In *Baker vs. Wheeler* 8 *Wend.* 505, the plaintiff cut logs on the defendant's land, under lawful authority and owned the logs. The defendant tortiously took and converted them, the plaintiff brought trover and recovered full value in improved state. The court limit the rule to a tortious taking.

—The editor of the last edition of these reports states in note that the cases 5, 6 and 10 John. do not touch the question of damages, and that the rule of 7 Cowen is fallaciously deduced from the other cases.

Neither does the celebrated case of *Salisbury vs. McCoon* 6 *Hill* 425, 4 *Denio* 332, 2 *N. Y.* 379, present any question of damages but simply a question of title. The plaintiff had wrongfully and intentionally taken corn not belonging to him, and made it into whiskey. The sheriff took the whiskey on an execution against the owner of the corn. This was the same thing, as if the owner himself had taken it, and it was held in suit against sheriff that the plaintiff had no title and could not recover.

The two English cases cited in 4 *Denio* 332 were both of same nature—the defendant had taken his own property in the improved state and the trespasser sued for it. Year Book 5 H. J. fol. 15. Sir Frances Moore Rep. 20.

There is then nothing in these cases inconsistent with our position. 7 Cow. and 8 Wend are the only two cases presenting questions of damage and they are both cases of wilful trespassers.

In code States, as Wisconsin, where all distinctions between forms of action are abolished, the question should not be embarrassed by any such consideration. The pleadings are same in Federal Courts.

Sherwood Ch.J. in *Austin vs. Huntsville Coal Mining Co. Mo.* 12 *Cent. L. J.* 233 says they are freed from any such embarrassment because they have but one form of action in that State.

The rule of damages should not in any case depend upon the form of action. Except in those special cases where punitory damages are allowed, the inquiry must always be what is an adequate indemnity to the party injured, and the answer to that inquiry cannot be affected by the form of the action in which he seeks his remedy.

Baker vs. Drake 53 *N. Y.* 211. 220.

McLean Co. Coal Co. vs. Long 81 *Ill.* 359. 363.

VI.

The Wisconsin Court, in *Single vs. Schneider* 30 *Wis.* 570, adhered so strictly to the doctrine of compensation as to abolish all distinction between innocent and wilful tresspassers. To restore this distinction the legislature enacted § 4269 *R. S. Wis.* which is as follows: "In all actions to recover the

possession or value of logs, timber or lumber, wrongfully cut upon the land of the plaintiff, or to recover damages for such trespass, the highest market value of such logs, timber or lumber, in whatever shape, place or condition, manufactured or unmanufactured, the same shall have been at any time before the trial while in the possession of the trespasser or any purchaser from him with notice, shall be found or awarded to the plaintiff, if he succeeds, except as in this section provided. The defendant in any such action may * * * serve on the plaintiff his affidavit that such cutting was done by mistake, and therewith an offer in writing, to allow judgment to be taken against him for the sum therein specified with costs." Provision is then made for the trial of the issue raised by the affidavit and its traverse.

It requires no argument to show, that this Statute does not embrace the case of an innocent purchaser from a trespasser. And such has been the uniform ruling of the Wisconsin Courts.

Wright vs. E. E. Bolles Wooden Ware Co., 50 *Wis.* 167.

Tuttle vs. Wilson, 52 *Wis.* 643.

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16-432

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

THE E. E. BOLLES WOODEN WARE COMPANY, PLAINTIFF IN ERROR, v. THE UNITED STATES. } No. 94.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

THE E. E. BOLLES WOODEN WARE COMPANY, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 94.

BRIEF FOR THE UNITED STATES.

This is an action by the United States to recover damages for the wrongful conversion of certain wood. (*Vide* Complaint, R., pp. 2, 3.)

The case is this: The plaintiff in error is a corporation having its *habitat* at West Depere, in the eastern district of Wisconsin.

The wood for the conversion of which this action was brought was cut, illegally, from the reservation occupied by the Oneida tribe of Indians, and taken to West Depere, and there sold to the plaintiff in error, which bought without any knowledge that the persons from whom it acquired the wood had no title.

The value of the wood where felled was twenty-five cents a cord, or $60.71 for the whole quantity converted, but its fair market value at West Depere was $3.25 a cord, or $850 for the entire quantity.

The whole matter of law and fact was submitted to the court (R., p. 7), and tried on a "stipulation of facts" (R., pp. 5, 6).

The court found for the plaintiff, and assessed its damages at $850.

On the trial the judges were divided in opinion upon the following question:

"Whether the plaintiff was entitled to recover from the defendant the value of said wood or timber at the place where the same was cut and severed upon the said reservation, to wit, the sum of $60.71, or the value thereof at the village of West Depere, as shown by the facts stipulated, to wit, the sum of $850."

The only question that can arise under this writ of error is the one on which the judges were opposed in opinion, all inquiry beyond being outside the commission of this court, and that question is, whether the value of the wood where felled, or its value where sold, shall be the measure of the plaintiff's damages.

In view of the well-established principle that in trover the measure of damages is the value of the property at the place of conversion, it is difficult to understand on what ground the judges of the court below were opposed in opinion.

It could hardly have been that either of them had a doubt that the invasion of the plaintiff's right of property by the defendant took place at West Depere, for it is clear law that the defendant's purchase of the wood there was a new, independent conversion.

The rule is, that anybody who assumes ownership of another's property is guilty of a conversion. The absence of improper motives is entirely immaterial. It has been held in England, over and over again, that it

is no defense to an action of trover by the assignees of a bankrupt against a purchaser from the bankrupt that he bought in ignorance of the act of bankruptcy and before the commission had issued, and on both sides of the Atlantic that an auctioneer innocently selling for a principal without title is liable in trover to the real owner. (4 M. & S. 260, Stephens *v.* Elwall; 5 East, 407, Bloxam *v.* Hubbard; 104 Mass., 173, Hills *v.* Snell, and cases therein cited; 55 Me. 147, Kimball *v.* Billings; 91 U. S., 637, Dows *v.* Nat. Exch. Bk.)

The purchase of the wood at West Depere by the plaintiff in error being a conversion of it *at that place*, the rule applies that the value of the property at the time and place of conversion is, *at the very least*, the measure of damages.

One of the exceptions to this rule is the principle that a wrong-doer shall not profit by his wrong, (Suydam *v.* Jenkins, 3 Sandf., 641; 5 M. & W. 357, Martin *v.* Porter; 3 Com., 379, Silsbury *v.* McCoon; 33 Ind. 127, Ellis *v.* Wire). Consequently, as the measure of damages in an action by the government against the original tort-feasors, from whom the plaintiff in error purchased, would be the price obtained for the wood at West Depere, it would be remarkable if the measure of damages in this action had not been adjudged to be the market value of the wood at the same place.

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